79-6688

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979
MISCELLANEOUS NO. _____

WILLIAM JAMES AHLBRAND — PETITIONER

V.

UNITED STATES OF AMERICA — RESPONDENT

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PETITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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MAY IT PLEASE THE COURT:

Comes William James Ahlbrand pursuant to Rule 23 of the Rules of the Supreme Court and petitions the Supreme Court for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit, to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 29, 1980, in support hereof states as follows:

a) William James Ahlbrand was convicted of participation in an illegal gambling operation (18 U.S.C. §1955) in the United States District Court for the Eastern District of Kentucky on May 24, 1979, and sentenced to the custody of the Attorney General for a period of two (2) years, with said sentence being suspended except for thirty (30) days and defendant was placed on probation for five (5) years. No opinion was issued by the District Judge at the time of conviction or sentencing.

The United States Court of Appeals for the Sixth Circuit affirmed the conviction on April 29, 1980, in Order No. 79-5191. A copy of the Opinion of the Court of Appeals, not scheduled to be reported, is appended hereto.

b) The Supreme Court has jurisdiction to grant certiorari in this case. The judgment sought to be reviewed was filed on April 29, 1980, and the mandate was issued on May 23, 1980. No application to extend the time for filing this petition has been sought. The source of jurisdiction is 28 U.S.C. §1254(1).

c) The question presented for review is:

(1) Whether the evidence against defendant was sufficient to support a conviction for violation of 18 U.S.C. §1955.

d) The following statutes, Rules of Criminal Procedure and Rules of Evidence are involved in this case:

18 U.S.C. §1955 provides:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years or both.

(b) As used in this section-

(1) "illegal gambling business" means a gambling business which-

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(e) The following is a statement of the case contining facts material to consideration of the question presented:

On January 16, 1979, a federal grand jury for the United States District Court for the Eastern District of Kentucky returned an indictment against defendant and six other men charging them with violation of 18 U.S.C. §1955. The indictment alleged, inter alia, that between August and October of 1977, at Newport, in the Eastern District of Kentucky, the defendant unlawfully, wilfully and knowingly conducted, financed, managed, supervised, directed and owned an illegal gambling business located at the Quality Sales Company, Inc., involving blackjack, poker, craps and other card games in violation of the laws of the Commonwealth of Kentucky. It further charged that the business involved five or more persons and was in substantially continous operation for a period in excess of thirty (30) days.

At the trial of defendant in Covington, Kentucky, the Government used various witnesses and exhibits to substantiate their position that defendant and several other indicted men were conducting and operating an illegal gambling business. Witnesses used included F.B.I. Agents, an employee and customers of the gambling operation, a local police officer and local "undercover" officers of the law.

In essence, the Government's theory as to defendant was that he was seen dealing poker hands on several occasions and therefore was guilty of conducting an illegal gambling operation or was acting as

an employee or one who aided such operation or both. For purposes of this appeal and only insofar as it applies to this defendant, it is conceded that jurisdictional requirements were met and that the Government's proof was sufficient to establish that an illegal gambling operation existed in Newport, Kentucky, as charged in the indictment. This operation involved games of chance, specifically blackjack and poker, and the illegal serving of alcoholic beverages. The extent of defendant's involvement is what is at issue before this Court.

Specifically, the only Government witnesses who even saw defendant on the premises were Thomas W. Beiting and Dan Groth. At the time of trial, Beiting was a criminal investigator for the U. S. Army, but at the time of this observations of the gambling operation he was working for Big Daddy's Liquor Store in Newport, Kentucky. Groth was an undercover officer for the Kentucky State Police.

Numerous other witnesses, including some called on behalf of the Government, were unable to connect defendant with the operation or even place him upon the premises during the three month period of operation of the gambling business. Beiting's testimony was later discredited by the testimony of a woman who was with him while at the gambling premises, and Groth's testimony was subsequently impeached by defendant's counsel by using Groth's previous testimony. Defendant's case, however, was allowed to go to the jury and his conviction followed.

f) This is not a review of the judgment of a state court so subdivision (f) of Rule 23 is inapplicable.

g) The basis for federal jurisdiction in the District Court was 18 U.S.C. §1955.

h) Following is a statement of reasons why a writ of certiorari should be issued in this case:

1) The first instance of testimony regarding defendant arose on cross-examination of government witness Michael Witte, a frequent visitor to the premises where the gambling operation was being conducted. Witte was a long time acquaintance of defendant and his testimony was that he had never seen defendant on any of the fifteen (15) or twenty (20) occasions that he had been there.

Then came the testmony of Thomas Beiting that defendant was observed dealing poker on two separate occasions. It is interesting to note, however, that his testimony was discredited by a friend of his, Sibyl Ritter, who testified that Beiting was intoxicated, that he never played cards as he had testified, and that she had never even seen defendant while on the premises with Beiting.

Dan Groth, an undercover officer of the Kentucky State Police, was then called by the Government and he testified that he had seen defendant dealing poker on one of his visits to the gambling premises. Yet on cross-examination by defendant's counsel, Groth admitted that nowhere in either of his reports to a Detective Keith of the Kentucky State Police did he mention the fact that defendant was dealing poker or that he was even there in spite of the fact that Groth testified that his reports were accurate. Going even further, defendant's counsel successfully impeached Groth by using Groth's prior testimony concerning the poker game in which defendant was supposed to have been a dealer. Groth had previously testified under oath that the poker game dealers were Charles Johnson and Jimmy Ahlbrand, also defendants in this case, with no mention being made of defendant.

Defendant was never again referred to by the Government during the case in chief of the prosecution, but additional evidence was presented as to his involvement by several defense witnesses. William Etherington, who had previously been called as a witness by the Government, testified that during the several times that he had been there, he had never seen a person by the name of "Billy Ahlbrand".

Catherine Cole was then called to testify and she, too, had been a witness of the Government. Her testimony was that she had been an employee of the gambling establishment for several weeks but that she had never even seen defendant upon the premises, and further, that she didn't think she would have missed him due to his size.

Then another Government witness, Michael Witte, was called to testify by defendant and he reiterated his previous testimony mentioned earlier in this petition.

Finally, Roetta Howard, who had been to the establishment in question between twenty (20) and thirty (30) times, testified that she had never seen defendant on the premises.

Notwithstanding the fact that the Court must view the evidence in a light most favorable to the Government when it concerns a sufficiency of the evidence issue, it is submitted that the evidence as a whole did not warrant consideration by the jury. Even though two witnesses placed defendant upon the premises, their testimony was so discredited by contradiction, omission and impeachment that it should have become the duty of the Court to grant an acquittal when that particular evidence was all that was of an incriminating nature to defendant.

2) The statute in question, 18 U.S.C. §1955, provides, in pertinent part, that it shall be unlawful for any person to conduct, finance, manage, supervise, direct or own all or part of an illegal gambling business. The word "conduct" has further been defined to mean the carrying on or the operation or the causing to function, and refers to both high level bosses and street level employees. United States v. Grezo, 566 F.2d 854, 860 (2d. Cir. 1977), United States v. Palmer, 465 F.2d 697, 699 (6th Cir. 1972).

In United States v. Mattucci, 502 F.2d 883 (6th Cir. 1974), the Court held that the conflicting testimony as to whether a man named Simone was a doorman and therefore one of the five who conducted the

gambling business, was a question for the jury. The Government will contend, no doubt, that such is the defendant's case and that the jury resolved these conflicts in the evidence in favor of the Government. It is urged, however, that defendant's situation was distinguishable from that in Mattucci, supra, due to the quality of the evidence presented. In defendant's case, it is very important to note that the only damaging evidence (as to defendant) was flatly contradicted and impeached, whereas in Mattucci, supra, the evidence was merely conflicting as to the role played by Simone. And in United States v. Nerone, 563 F.2d 836 (7th Cir. 1977), the Court reversed a conviction on the grounds of insufficiency of evidence because numerous witnesses established that the defendant Gentry never gambled or assisted in the operation of any of the games, even though the star witness for the prosecution stated that Gentry would take care of the door a little bit. Nerone, supra, at 844-845. That case perhaps best illustrates defendant's position in the instant case.

The Sixth Circuit Court of Appeals has held, in United States v. Tarter, 522 F.2d 520, 526 (6th Cir. 1975), that "Congress imposed liability not on participants in social or neighborhood gambling activities but on active participants in a 'gambling business'...". Even though street level employees such as runners, telephone clerks, salesmen and watchmen can be counted as active participants, there are certain situations where this is not enough. As pointed out by the Court in United States v. Leon, 534 F.2d 667 (6th Cir. 1976): "at the same time, however, the participants in a gambling business must have some concert of action." Nowhere in the case at hand did the evidence demonstrate that defendant had any concert of action other than the contradicted and impeached testimony of two witnesses. That evidence occurs in only two places in the voluminous trial record and for this reason, coupled with the arguments and authorities previously stated, it is urged that the evidence pertaining to

defendant does not fall within the meaning of the term "conduct" as used in 18 U.S.C. §1955.

Now for the foregoing reasons William James Ahlbrand urges a writ of certiorari issue to the Court of Appeals for the Sixth Circuit dated this 28th day of May, 1980.

Respectfully submitted.

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NOS. -5190, 79-5191, 79-5200, -5201, 79-5251

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

...1980

JOHN P. HEHMAN, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-vs-

ORDER

JAMES DOUGLAS HOLT, JR.,
WILLIAM JAMES AHLBRAND,
RICHARD LEWIS HERTHEL,
CHARLES DAVID JOHNSON,
JOHN CLYDE AHLBRAND,

Defendants-Appellants.

BEFORE: ENGEL, BROWN and KENNEDY, Circuit Judges.

Appellants, James D. Holt, Jr., William James Ahlbrand, Richard Lewis Herthel, Charles David Johnson, and John Clyde Ahlbrand appeal from their convictions for conducting an illegal gambling business in violation of 18 U.S.C. § 1955. On appeal they raise the following issues: (1) whether the evidence was sufficient to sustain a conviction; (2) whether expert testimony regarding the usual manner in which gambling card games are played was improperly admitted; (3) whether the jurisdictional prerequisites of the statute were met, including whether the gambling business met the thirty-day substantially continuous requirement; (4) whether the activities of some defendants amounted to conducting a gambling business within the meaning of the statute; (5) whether the District Court definition of "conduct" in the jury instructions was improper; (6) whether

§ 1955 gives adequate warning as to what constitutes criminal conduct; (7) whether the District Judge erred in not giving a requested circumstantial evidence instruction; (8) whether the United States Attorney's closing rebuttal argument was inflammatory and improper; (9) whether the District Judge erred in not granting additional peremptory challenges; (10) whether the District Judge improperly failed to suppress evidence in the possession of the prosecutor pursuant to an inadequate search warrant; (11) whether the District Judge erred in not granting separate trials; and (12) whether the District Judge improperly failed to grant a mistrial as to one defendant when his attorney claimed an inability to cross-examine a witness fully as a result of information about the witness gained from an attorney-client relationship with that witness. Upon consideration of the briefs and oral arguments of counsel together with the record on appeal, the Court concludes that the judgment rendered below and the decisions of the District Court on the issues raised were correct.

Accordingly, the judgment is affirmed.

ENTERED BY ORDER OF THE COURT

John A. Schneider

Clerk

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